(12)

No. 91-535

In The

Supreme Court of the United States

October Term, 1991

ALAN B. BURDICK,

Petitioner,

vs.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; and BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, FLORIDA, LOUISIANA, NEVADA, NORTH CAROLINA, OKLAHOMA, SOUTH DAKOTA, UTAH, WYOMING, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Hawaii's election code, which affords voters seeking to support particular candidates easy access to the primary election ballot and the opportunity for supported candidates to wage a ballot-connected campaign, is unconstitutional on its face, or as applied, merely because write-in votes are not permitted at either the primary or general election stages?

2. Whether the First Amendment renders the voting booth an unlimited public forum such that, irrespective of whether a State permits individuals to hold office, the State must count and publish all write-in votes cast at all state-run elections?

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STATEMENT OF INTEREST

The amici States are charged with administering elections for local, State, and National offices within their respective jurisdictions. They have a fundamental interest in this case, in which a Hawaii voter challenges a prohibition placed by Hawaii law on the casting and counting of write-in votes at both the Hawaii September primary and the November election.

Generally avoiding a particularized chalienge to State limits on voters' abilities to place their candidates on the printed ballot, Alan Burdick claims the Constitution prohibits a state ban on write-in voting no matter how "extraordinarily liberal" the election law is otherwise. *See* Pet. Br. at 31.

Contrary to Petitioner, the amici States submit they have broad authority to regulate the electoral process, and to do so, consistent with the Constitution, in a way that may well "leave some voters, at some time, without a candidate that they can support" on election day. *Id.* Amici thus will urge that regulation, or even prohibition, of write-in voting at primary or general elections, is constitutional, if adequate access to the printed election ballot is granted to new and minor parties, independent candidates, and voters who support them.

Because the Hawaii election code meets this test, and bars write-in voting for reasons that have been upheld as important and compelling, the amici States submit this Brief in support of the Hawaii election officials and the judgment of the Court of Appeals for the Ninth Circuit. That judgment properly rejected Petitioner's claim that the Constitution guarantees "an unlimited right to [write-in] vote for any particular candidate." *Burdick v. Takushi*, 937 F.2d 415, 419 (9th Cir. 1991).

Amici are concerned that Petitioner's claim, if granted, would cast doubt not only on laws that regulate, or bar, write-in voting, but on the States' general discretion to regulate elections. This discretion is provided by the Constitution's text, *see* U.S. Const. art. I, § 4; *id.* art. II, § 1; *id.* amend. X, and has been repeatedly recognized by this Court. Indeed, this Court has held that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

In contrast, Petitioner's claim, if granted, would threaten laws of well over thirty States. At least six States, including Hawaii, bar write-ins at general, or run-off elections.[1] Seven others bar write-ins for certain general election candidates.[2] At least 16 States prohibit write-in votes at primary elections.[3] And well over twenty

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[1] *See* Nev. Rev. Stat. § 293.270(2) (1991); Okla. Stat. Ann. tit. 26, § 71-127 (Supp. 1989); S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990). *See also infra* note 2.

[2] *See* Texas Code Ann. (Vernons') § 146.002 (1986) (banning write-ins in run-off elections); Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986) ("no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary"); N.M. Stat. Ann. § 1-12-19.1(E) (Supp. 1985) (to same effect as Washington law); Ohio Rev. Code Ann. § 3513.04 (1989) (same); Ill. Ann. Stat. ch. 46, ¶ 17-16.1 (1991) (barring write-in votes for candidate "who is defeated for his or her nomination at the primary"); *see also* Ky. Rev. Stat. § 117.265(3) (no write-ins for Pres. electors); Neb. Rev. Stat. § 32-428 (1988) (other offices). Louisiana also does not permit write-in votes at the run-off stage, although there is no statute specifically so providing.

[3] In addition to Hawaii and the States cited at *supra* n.1, *see* Alaska Stat. § 15.25.070 (1988); Fla. Stat. § 101.011(6) (1989); Ga.

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States require often substantial pre-election filings by write-in candidates as a condition of having write-in votes counted for them.[4] All of these laws, to one degree or another, may work under a variety of circumstances to prohibit a voter from "cast[ing] a write-in vote for the person of his choice." Pet. Br. at 11.

Amici thus disagree with the claim that it is unconstitutional to impose limits on voters whose candidates have not filed timely and sufficient nomination papers,

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Code Ann. § 34A-1124 (Harrison Supp. 1988); Kan. Stat. Ann. §§ 25-213 (1986); Ind. Code Ann. § 3-8-2.5(e) (Burns Supp. 1991); Md. Ann. Code, art. 33, § 5-3(f) (1986); Minn. Stat. § 204B.36(2) (1988); N.C. Gen. Stat. § 163-151(6)(e) (1987); Tex. Code Ann. § 172.112 (1986); W. Va. Code § 3-6-5 (1978); Wis. Stat. § 8.17(3)(a) (1987-88). We understand that Alabama, as a matter of policy, does not permit primary write-in votes.

[4] *See* Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1989); Ark. Stat. Ann. § 7-5-205 (Supp. 1989); Cal. Elec. Code § 7300 (West 1977 & Supp. 1990); Colo. Rev. Stat. § 1-4-1001 (1980 & Supp. 1989); Conn. Gen. Stat. § 9-373(a) (1989); Fla. Stat. Ann. § 99.061(3) (West 1982 & Supp. 1991); Ga. Code Ann. § 34A-915 (Harrison Supp. 1988); Idaho Code § 34-702A (Supp. 1989); Mass. Gen. Laws Ann. ch. 54, § 78A (West. 1991); Md. Elec. Code § 4D-1 (Supp. 1989); Mo. Rev. Stat. § 115.453(4) (1986); Mont. Code Ann. § 13-10-211 (1989); Neb. Rev. Stat. § 32-428.10(2) (1989); N.M. Stat. Ann. § 1-12-19.1A (1985 & Supp. 1991); N.Y. Elec. Law § 6-154 (McKinney 1978 & Supp. 1992); N.C. Gen. Stat. § 163-123(a) (1987 & Supp. 1991); N.D. Cent. Code § 16.1-12-02.2 (Supp. 1991); Ohio Rev. Code Ann. § 3513.041 (Anderson 1988 & Supp. 1991); Or. Rev. Stat. § 249.007 (Supp. 1991); Tex. Elec. Code § 192.036 (Vernon 1986 & Supp. 1991); Utah Code Ann. § 20-7-20 (1984 & Supp. 1991); Wash. Rev. Code Ann. § 29.04.180 (1965 & Supp. 1991); Wis. Stat. §§ 8.16(2) & 8.185(2) (1986 & Supp. 1991).

made sufficient preliminary showings of support, survived primary nomination processes, otherwise evidenced compliance with "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself," or, for that matter, even shown any interest in serving if elected.[5]

In sum, the position of the amici States is that each State in our Federal system should be free to choose its own way of addressing the policy questions inherent in decisions to allow or not allow write-in votes under particular circumstances. To hold otherwise, amici submit, would eliminate an enormous range of electoral options and improperly subordinate state interests that the courts have long held are important and compelling.

STATEMENT OF THE CASE

The amici States adopt Respondents' Statement of the Case.

SUMMARY OF ARGUMENT

1. In upholding Hawaii's electoral system despite its ban on write-in voting, the Ninth Circuit properly deferred to the State's authority to conduct elections. *See Norman v. Reed*, 112 S.Ct. 698 (U.S. 1992); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971);

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[5] *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); *see Munro v. Socialist Workers' Party*, 479 U.S. 189, 196 (1986); *Mandel v. Bradley*, 432 U.S. 173 (1977); *American Party v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974).

Williams v. Rhodes, 393 U.S. 23 (1968). This decision correctly heeded principles of Federalism that limit the federal role in regulating the States' electoral processes. *See infra* pp. 6-10.

2. The court of appeals properly held that the burden imposed by Hawaii's ban on write-in voting was justified by Hawaii's compelling interests in regulating its elections. Hawaii grants "easy access to the primary ballot," and "an opportunity to wage a ballot-connected campaign," but also makes the primary " 'an integral part of the entire election process.' " *Munro v. Socialist Workers' Party*, 479 U.S. 189, 196, 199 (1986). At the primary, Hawaii law protects against true "party raiding." *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986). At all stages of the electoral process, the ban fosters "informed and educated expressions of the popular will," *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983), allowing election officials "to verify the validity of signatures on . . . petitions, to print the ballots, and, if necessary, to litigate any challenges" to the candidates. *American Party of Texas v. White*, 415 U.S. 767, 787 n.18 (1974). The ban also " 'protect[s] the integrity of [the State's] political processes,' " by eliminating an entire class of paper from the voting process and reducing the risk of vote-buying. *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981). Under a straightforward application of *Munro*, or a detailed analysis under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), Hawaii's election law is constitutional.

3. Viewed as a whole, Hawaii law does not seriously burden a voter's right to express support for chosen candidates. Hawaii law allows voters to express

support for candidates in a single open primary for established party candidates, new party candidates, and nonpartisan candidates. Although each of these routes have differing risks and burdens, the electoral system as a whole provides adequate political opportunity. Hawaii's regulation of elections thus is constitutional. The argument that this is not a "ballot access" case is without merit.

4. Even if Petitioner has presented the distinct claim that he is entitled to cast a "protest" vote for one or more candidates who are not eligible for placement on Hawaii's primary or November ballot, and to have the vote "counted and published" without any effect on the electoral result, that claim is at odds with the rule that a State may, in a limited forum such as the voting booth, discriminate "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are content neutral." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 806 (1985). Hawaii's limits on write-in voting meet this test.

ARGUMENT

A. Petitioner's Claim that the Constitution Mandates Unlimited Opportunity to Cast Write-in Votes at All State-Assisted Elections Would, if Granted, Nullify the States' Constitutional Discretion to Regulate Elections.

At the heart of this case is a single Hawaii voter's broad claim that his State must not only allow, but count, publish, and credit, write-in votes without limitation at both its primary and general elections.[6] Thus, according

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[6] The District Court's injunctions in this case mandated that the Hawaii officials "provide for the counting, recording,

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to Petitioner's brief, any time any State "leave[s] some voters, at some time, without a candidate that they can support" (Pet. Br. 31), the First and Fourteenth amendments mandate write-in voting. Thus, Petitioner states, "Hawaii could not escape the issues raised by this case even if it were extraordinary in granting candidates access to the ballot." *Id.* It is this claim that the Ninth Circuit properly rejected in holding that Petitioner "does not have an unlimited right to vote for any particular candidate." *Burdick v. Takushi*, 937 F.2d at 419.

The Ninth Circuit's unsurprising result was mandated not only by the ways which the Constitution itself regulates elections for federal elective office, but by the Constitution's express grants to the States, and more than 20 years of precedent, beginning with *Williams v. Rhodes*, 393 U.S. 23 (1968). In that precedent, this Court has clarified the situations in which neutrally drawn ballot laws could be federally challenged on the basis of their alleged severe burdening of the availability of political opportunity.

1. Mandatory Unlimited Write-in Voting is Not Consistent With the Express Language of the Constitution.

The republican form which the Constitution establishes for our National Government itself strongly suggests that no broad right as is claimed in this case exists

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and tabulation of [all] write-in votes" cast without limit. *See* Joint Appendix ("J.A.") 77a. Although the District Court's 1986 orders indicated the court would not pass "upon the eligibility of" any person who received a plurality of votes "to take office," *id.*, that proviso was absent from the 1990 injunction.

as a matter of federal constitutional compulsion. As the Ninth Circuit observed, the Constitution itself is replete with provisions that are at odds with a voter's claimed right to vote for whomever he pleases.

Article I, § 2 thus provides that "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Likewise, Article I, § 3 provides that "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." Article II, § 1 provides that "No Person except a natural born Citizen . . . shall be eligible to the Office of President" and "neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States." These constitutional commands inexorably displease some voters, who may believe that the Founders did not properly weight the relative benefits of youth over experience, or the importance of residence and citizenship to one's ability to serve. The Fourteenth Amendment itself provided additional qualifications that undoubtedly served to overrule what otherwise would have been the popular vote on election day. U.S. Const. amend. XIV, § 3.

Indeed, the one election the Constitution most closely regulates – that for President and Vice-President – itself contains provisions that are at odds with the notion of "write-in" voting. Thus, in the event no person receives a majority of electoral votes, the House of Representatives may choose only "from the persons having the highest

numbers not exceeding three on the list of those voted for as President."

Likewise, the Senate, to whom falls the task of choosing the Vice-President in the event no person receives a majority of electoral votes for that office, may chose only "from the two highest numbers on the list." U.S. Const. amend. XII.

Applied to its fullest extent, Petitioner's "write-in" voting claim would nullify these "run-off" provisions which prohibit States, when casting their votes for President in the House of Representatives, or the Senate, when choosing a Vice-President, from "writing-in" candidates, even when it is true that those candidates who would be written-in have the overwhelming support of constituents on the day of the election.

The Constitution likewise grants discretion to the States to formulate similar electoral systems that ban or limit write-in votes. Article I, § 4 states that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," while Article II, § 1, states that "Each State shall appoint, [its members of the electoral college] in such Manner as the Legislature thereof may direct." The regulation of State and local elections is thus plainly a power "reserved to the States respectively, or to the people." U.S. Const. amend. X.

2. This Court's Decisions Grant the States Extensive Discretion to Regulate Their Electoral Processes, and to Choose Whether and How To Allow Write-in Votes.

This Court has been cognizant that the substantive – and procedural – requirements a State imposes on its

elected officeholders through the election code reflect "decision[s] of the most fundamental sort for a sovereign entity." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2400 (1991). If the States' discretion in this area is to be meaningful, it must be that States can, at the least within broad limits, prescribe conditions for election that, in some cases, "leave some voters, at some time, without a candidate that they can support." Hawaii's choice to focus its elections on a printed ballot is thus one way a State may properly exercise its constitutional power over elections.

The States' discretion to ban at least some write-in votes is virtually self-evident. Although Articles I and II do not give "States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions," *Williams v. Rhodes*, 393 U.S. 23, 29 (1968), in interpreting the Constitution in the area of voting rights, the Court has noted that "associational rights [implicated by the right to vote] . . . are not absolute." *Munro v. Socialist Workers Party*, 479 U.S. 179, 193 (1986). That the limits on associational rights support a limitation or even ban on write-in voting is well grounded in the decisions of this Court.

i. A Ban On Write-in Voting at the General Election Serves the Compelling Interest of Confining Factionalism and Reserving the General Election for Major Struggles.

Like the States that ban write-in votes at the November or run-off election, or for broad classes of candidates who have run in the primary and lost, Hawaii's ban on general election write-ins is nothing more than a way of saying the primary should count. This Court has long

upheld the States' ability to define where and how they wish to narrow the primary field:

> After long experience, California came to the direct primary as a desirable way of nominating candidates for public office. It has also carefully determined which public offices will be subject to partisan primaries and those that call for nonpartisan elections. Moreover, after long experience with permitting candidates to run in the primaries of more than one party, California forbade the cross-filing practice in 1959. A candidate in one party primary may not now run in that of another; if he loses in the primary, he may not run as an independent; and he must not have been associated with another political party for a year prior to the primary . . . . The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates.

Storer v. Brown, 415 U.S. 724, 735 (1974). This power to make the primary count has been "reaffirm[ed]" on many occasions "with unmistakable clarity." *Munro*, 479 U.S. at 194.

Linked to Hawaii's interest in avoiding "unrestrained factionalism" is the obvious desire "to simplify the general election" by eliminating races where a primary winner faces no other opponent who has survived the primary process. Thus, Hawaii's laws mandate the seating of candidates for state legislature and city and county government who emerge from the September primary without balloted opposition. *See* Haw. Const. art. III, § 4 (Supp. 1991); Haw. Rev. Stat. § 12-41. Likewise, "runaway primary winners" in races for Governor and Congress, or

their parties, have rights to name successors in the "gap" period between the primary and election day. Hawaii thus acts "to protect the mandate of the previous election," *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 13 (1982), in those cases in which only one party fields candidates and no independent candidates survive the September primary process.

As this Court's decision in *Munro* emphasizes, Hawaii is well within its constitutional discretion in "reserv[ing] the general election ballot 'for major struggles' " in this fashion.

ii. A Ban On Write-in Voting at the Primary Serves the Compelling Interest of Preventing Strategic Voting.

Hawaii's ban on primary write-ins, like those of more than a dozen other States, also serves compelling interests and is within the States' power. As this Court's decisions recognize, substantial regulation of primary processes is required if the process of voting is to be a meaningful one. *Cf. Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932). The degree of regulation of primary processes, however, requires careful balancing of the interests of the parties, *see Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1987), with the compelling need to provide access to party fora given the reality that, in many districts, or in the State as a whole, party nominating procedures may be the only processes relevant to the November election. Thus, wholly consistent with State efforts to open primary processes up to the general voting public, *see id.* at 222-23 & n.11, States may nonetheless take measures to prevent

true strategic voting at the primary stage so as to preserve a regulatory equilibrium in which voter access to party structures is secured while constitutional challenges to invasion of party structures, *e.g., Democratic Party v. Wisconsin*, 450 U.S. 107 (1981), are effectively forestalled.

Hawaii's ban on primary write-ins is one of several ways the States seek to accommodate their conflicting roles in overseeing primary processes within their States. While Hawaii has an "open primary" "in which all registered voters may choose in which party primary to vote," Hawaii also has adopted statutes that ensure the political parties retain a measure of immunity from the dangerous effects of strategic voting or "party raiding," which occurs typically where the dominant party "raids" another party's primary so as to eliminate the possibility of real competition at the general election. *See Anderson*, 460 U.S. at 789 n.9. Thus, a party candidate must certify that he or she "is a member of the party," Haw. Rev. Stat. § 12-3(b)(7). Hawaii also prohibits the filing of nomination papers "in behalf of any person for more than one party," *id.* § 12-3(c). The ban on write-in voting, coupled with Hawaii's sixty-day pre-primary filing deadline, *see id.* § 12-6, not only vindicates these specific statutes, but provides to the parties the important tool of time in which to defeat a "party raid." By requiring candidates to announce and file sixty days before the primary, Hawaii law allows the parties to challenge candidates who are not bona fide party members, and otherwise allows party members time to campaign against a would-be "party raider."

iii. A Ban On Write-in Voting Serves Interests in Fostering Voter Education, in Pre-screening Candidates, and Eliminating the Risks of Vote-Buying, Fraud, and Other Evils.

This Court has also "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9. Thus, pre-election filing deadlines that enjoin voters to see to it that their candidates file by a date certain or be barred from casting votes for them have, except in extraordinary circumstances, been upheld. *See American Party of Texas v. White*, 415 U.S. 767, 787 & n.18, 788 (1974). Filing deadlines, like candidate residency requirements, do "not act as an outright ban on anyone's candidacy," and therefore have "only a negligible impact on the voters' right to have a meaningful choice of candidates." *Chimento v. Stark*, 353 F. Supp. 1211, 1216, 1217 (D.N.H.), *aff'd*, 414 U.S. 802 (1973).

In the context of Hawaii's generally liberal access to the primary ballot and opportunities to wage ballot-connected campaigns, Hawaii's ban on write-in voting operates similarly to the laws of more than half the States, which regulate write-in voting in such a way to prohibit the counting of write-in votes for candidates who fail to file statements of candidacy, or otherwise register for the election. In fact, since the only reason Mr. Burdick had anything to complain about was the failure of candidates to file in the Democratic primary for state legislature by July 24, 1986, this case, at most, is about the propriety of such a filing deadline. *See Storer v. Brown*, 415 U.S. at 736 (even if other provisions of election code were invalid, candidates would "still properly [be] barred").

Hawaii's ban on write-in voting, together with its filing deadlines, operates neutrally, and serves numerous important interests. In fact, by making the deadlines "stick," Hawaii has taken the view that electoral competition will be better served by procedural regularity than by the more chaotic approach taken by other States. *Cf. Storer*, 415 U.S. at 730.

Given the realities of political fundraising, and the opportunities for well-heeled candidates to undercut their less wealthy opponents by a last minute campaign, establishment of default dates is essential to the hopes of many unknown candidates who undoubtly would not enter the race at all if other candidates, particularly those with large personal or organizational resources at their disposal, could join the fray any time on a write-in campaign. This is especially true for offices with small constituencies and low pay, where the threat of late-blooming candidacies can discourage all but the irrationally committed from the sort of extended grass roots campaigning necessary if a new or minor party candidate is to have a serious chance of victory. *Cf. Anderson v. Celebrezze*, 460 U.S. at 790-96 (noting opposite concerns for new and minor party candidates for President, as major party candidates are chosen in national processes that conclude in the summer).

Moreover, filing deadlines secure "the State's interest in fostering informed and educated expressions of the popular will" (*id.* at 796) by granting voters, and the press, a minimum period in which to study the candidates, and, particularly in races of lesser notoriety, to find out what the election is really about. Under unlimited write-in schemes, it is "easy to visualize that an unscrupulous person or group of persons might deliberately

refrain from filing as candidates and then at the moment before the polls close, appear and elect themselves . . . by writing in their names on a ballot." *Gebelein ex rel. State v. Nashold*, 406 A.2d 279, 281 (Del. Ch. 1979). By prohibiting write-in votes and remanding voters to the procedures for nominating candidates to the printed ballot, Hawaii vindicates "the right of the electorate to be fully informed as to whom is seeking office and what they stand for." *Id.* Thus, Hawaii seeks to correct the distortions in the electoral marketplace caused by late-blooming candidacies, and thereby " 'protect the integrity of its political processes from frivolous or fraudulent candidacies.' " *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981).

A State's interest in enforcing filing deadlines, however, extends beyond these "market corrective" goals, for a State has a compelling interest in taking off the ballot altogether candidates who do not meet minimum age, residency, or other neutral requirements "that serve legitimate state goals which are unrelated to First Amendment values." *Anderson*, 460 U.S. at 789 n.9. For example, Arizona and Texas, in addition to Hawaii, have enacted "resign-to-run" laws which are enforced in part by the limitations on write-in voting in those States. *See Fasi v. Cavetano*, 752 F. Supp. at 950 n.4 (comparing *Clements v. Fashing*, 457 U.S. 957 (1982), and *Joyner v. Moffard*, 706 F.2d 1523 (9th Cir. 1983)). Pre-election filing deadlines are thus not only "justified by administrative concerns," *see Anderson*, but also exist to "ensur[e] that governmental processes are not disrupted by vacancies." *Lynch v. Illinois State Board of Elections*, 682 F.2d 93, 97 (7th Cir. 1982) (dealing with situation of post-election vacancy). They also afford the States the opportunity to require of write-in candidates a showing of support, willingness to serve,

and compliance with other neutral requirements upon which nomination may be lawfully conditioned. *See American Party of Texas*, 415 U.S. at 787 n.18. At least in the context here, where Petitioner brings a purely facial challenge to Hawaii's ban on write-in voting, his inability to point to any write-in candidate who even sought to file nomination papers renders his constitutional claim meritless.

Finally, whether they choose to exercise it or not, the States plainly have the discretion to implement methods of voting that eliminate the potential for vote-buying, whereby the system of free elections is subordinated by powerful interests. As the Supreme Court of California observed ninety years ago, the broad allowance of write-in voting permits voters to "writ[e] the name of any other elector, or even his own name, in the blank column, under the title of any office, as might be agreed between him and a person purchasing or coercing his vote." *Patterson v. Hanley*, 136 P. 821, 823 (1902). While California has chosen not to strike so hard at vote-buying, Hawaii, whose courts justified Hawaii's ban on write-in votes early on as intended "to secure secrecy of the ballot," *Holstein v. Young*, 10 Haw. 216, 222 (1896), has for close to a century sought to implement a strong version of the Australian ballot reform. Hawaii's interest in preventing a return to the system described as one in which "the electoral system was riddled with abuses" including a "quite alarming" prevalence of "bribery"[7] deserves this Court's respect as a device to "protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. at 788.

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[7] *See* Fredman, *The Australian Ballot: The Story of an American Reform* 22 (1968).

B. The Specific Holdings of this Court, as Well as Other Persuasive Appellate Precedent, Firmly Support A Generous Standard of Review for Hawaii's Election Law, and Affirmance of the Judgment Below Sustaining Hawaii's Exercise of its Authority to Regulate Elections.

Even putting to one side the compelling State interests that justify limitations on write-in voting, the precedents of this Court firmly rebut the conclusion that there is any *per se* right to cast write-in votes as Petitioner claims. Indeed, in addition to this Court's reasoning in particular cases, the specific holdings of this Court's decisions in the election field support the Ninth Circuit's judgment upholding Hawaii's law.

Williams v. Rhodes, 393 U.S. 23 (1968), in which an extremely restrictive set of election laws intersected to "make it virtually impossible for any party to qualify on the ballot [for President] except the Republican and Democratic parties," *id.* at 25, provides the starting point for analysis here.

Ohio's laws at issue in *Rhodes* – the only laws ever to provoke a write-in voting directive from this Court – warrant close scrutiny. As the Court noted in *Rhodes*, Ohio's 1968 code required, for those seeking to support third party presidential candidates: (1) collection of "petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election"; (2) filing of the petitions by February 7 of the election year, eight months before election day; (3) collection of signatures from those who had never voted in a previous election, as well as, at the primary stage, and (4) formation of a "state central committee" composed of "two members from each congressional district and county central committees for each county," and election

of "delegates and alternates" to a national convention, a requirement, in short, that the new party find "over twelve hundred members who had not previously voted in another party's primary, and who would be willing to serve as committeemen and delegates." *Rhodes*, 393 U.S. at 24-25 & n.1, 26.

Because of these "burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent [dissident] voters from every getting on the ballot," this Court affirmed the judgment striking down the Ohio requirements at issue, and affirmed a grant of "relief to the extent of [allowing the Socialist Labor Party to have] the right, despite Ohio laws, to get the advantage of write-in ballots." 393 U.S. at 34. Write-in voting, as viewed in *Rhodes*, was thus perceived by the majority as a possible *remedy* to otherwise grossly burdensome election schemes, and not; as Petitioners would have it, a *right* in and of itself.

Since *Rhodes*, this Court has confronted numerous election schemes, and never has it even intimated that the availability of unrestricted write-in votes, in any form, is a necessity for the States. In *Bullock v. Carter*, 405 U.S. 134 (1972), which dealt with Texas's primary election filing fees, the Court noted that "write-in votes are not permitted in primary elections for public office," but held, in the face of this observation, that "Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast." *Id.* at 137, 143. "Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby [only] tending to limit the field of candidates from which voters might choose." *Id.* at 143. Although Texas's "patently exclusionary" filing fees were struck down as "irrational" with

respect to Texas's goal of eliminating "spurious candidates," *id.* at 143, 146, and as improper with respect to Texas's goal of requiring private sources to bear the cost of elections, *id.* at 147-48, nothing in the Court's language in *Bullock* at all suggests that write-in voting itself was constitutionally guaranteed.

Likewise, in *Lubin v. Panish*, 415 U.S. 709 (1974), this Court addressed California's election code, which allows write-in votes, but which on a number of fronts regulates the circumstances in which write-in votes may be cast.[8] The Court struck down California's mandatory filing fees solely on the ground that "California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters." *Id.* at 718.

Lubin is instructive for this case as it makes clear the State's interest in "limiting the size of the ballot in order to 'concentrate the attention of the electorate on the selection of a much smaller number of officials and so afford

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[8] *See* Cal. Elec. Code § 7300 (West. 1990) ("Every person who desires to be a write-in candidate and have his or her name as written on the ballot of an election counted for a particular office shall file: (a) A statement of write-in candidacy" providing "(1) Candidate's name. (2) Residence address. (3) A declaration stating that he or she is a write-in candidate. . . . and (b) [t]he requisite number of signatures on the nomination papers [for other candidates]"; *id.* § 7301 (must be filed with officials "no later than the 14th day prior to the election"). These terms are not substantially different from those described at Cal. Elections Code § 18600 et seq. (Supp. 1974), referred to in *Lubin v. Panish*, 415 U.S. at 710-11.

to the voters the opportunity of exercising more discrimination in their use of the franchise.' " 415 U.S. at 712. Thus, the Court emphasized that in constitutionally acceptable state electoral systems "[i]t is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues," but "[t]his does not mean every voter can be assured that a candidate to his liking" will be available to support. *Id.* at 716. The Court's remedial order in *Lubin* in no way indicates that write-in voting would be necessary to meet constitutional standards, and, in fact the Court's precise language suggests just the opposite.

The Court, for example was well aware that "[t]he California statute provides for the counting of write-in votes [only] subject to certain conditions." 415 U.S. at 710-11. Yet its remedial order in no way suggests these conditions ought to be eliminated. *See also Storer v. Brown*, 415 U.S. 724, 736 (1974) (referring to the regulated "write-in alternative provided by California law" (citing the identical limited write-in law)).

This unsurprising result meshed with the *Lubin* Court's realistic assessment of the role of write-in voting in modern politics. Because "[t]he realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot," the constitutional value of even regulated write-in voting schemes to state electoral systems "appears dubious at best." 415 U.S. at 719 n.5. Thus, a state system of write-in voting route is neither sufficient, *nor* necessary, to sustain the constitutionality of election laws.

This Court's more recent cases have not only followed *Lubin's* disparagement of the significance of write-in voting, *see Anderson*, 460 U.S. at 799 n.26; *cf. id.* at 808 (Rehnquist, J., dissenting) (lack of write-ins is "squarely held" to be "of no relevance"), but amplify the precedential basis for Hawaii's ban. Thus, in *Munro v. Socialist Workers Party*, 479 U.S. 179 (1986), this Court sustained Washington's "blanket primary" restrictions on new and minor party candidates, despite the fact that Washington law not only provides "[t]hat no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary," Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986), but that write-in candidacies, where they are allowed, must also meet conditions as to timing, filing, and support. *See id.* § 29.51.170 (Supp. 1990). *See also Socialist Workers Party v. Munro*, 765 F.2d 1417, 1419 (9th Cir. 1985) (noting Washington's partial write-in ban).[9]

A reading of this Court's precedents which supports Hawaii law here is also supported by the weight of persuasive case law in the courts of appeals, and in the State appellate courts. As Judge Posner wrote for the court in *Hall v. Simcox*, 766 F.2d 1171, 1175 (7th Cir.), *cert. denied*, 474 U.S. 1006 (1985):

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[9] *Compare also Norman v. Reed*, 112 S. Ct. 698 (1992) (upholding Illinois' 2% signature filing requirements), *with Stevenson v. State Board of Elections*, 638 F. Supp. 547, 552 (N.D. Ill. 1986) (noting Illinois limits on write-ins), *and Clements v. Fashing*, 457 U.S. 957 (1982) (upholding Texas's resign-to-run-law), *with Fasi v. Cavetano*, 752 F. Supp. 942, 950 n.4 (D. Haw. 1990) (en banc) (noting write-ins for Texans subject to resign to run law are barred).

> In general the danger zone does not even begin until a state goes above 2 percent [in its party qualification petition requirements]; and while under the precedents a 2 percent requirement, or in special cases an even smaller requirement, *see Libertarian Party v. Beermann*, 598 F. Supp. 57, 60 (D. Neb. 1984), could be struck down if combined with other restrictions – and some states are ingenious in devising such restrictions, see Blackman, Third Party President? An Analysis of State Election Laws, ch. 4 (1976) – we do not think that barring write-in votes, the only other restriction in Indiana's law that the Communist party has cited to, can put the plaintiff over the hump; as a practical matter it is a trivial distinction.

Likewise, as the Tenth Circuit has observed, so long as a State otherwise provides sufficient opportunity to place candidates' names on the ballot, "we do not think that the lack of write-in votes is, as a practical matter, a significant distinction." *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740, 745 n.8 (10th Cir. 1988). The Eighth Circuit even went so far as to rule that the refusal to count write-in votes did not even present a substantial federal question. *McClain v. Meier*, 851 F.2d 1045 (8th Cir. 1988). Other courts have persuasively upheld bans on write-in voting at the primary stage. *See Harden v. Board of Elections*, 74 N.Y.2d 796, 544 N.E.2d 605, 606, 545 N.Y.S.2d 686 (1989) (rejecting the equitable remedy of write-in voting to allow party the "opportunity to ballot" a candidate); *State Administrative Board of Election Laws v. Calvert*, 272 Md. 659, ___, 327 A.2d 290, 299 (1974) (" 'the write-in privilege . . . is inconsistent with the whole theory of primary elections' ") (citation omitted), *cert. denied*, 419 U.S. 1110 (1975); *but see Dixon v. Maryland State Board*, 878 F.2d 776 (4th Cir. 1989).

The conclusion to be drawn from these precedents is that State election schemes are to be evaluated according to a generous standard when it comes to their regulation of write-in voting. Indeed, as a general matter, in the absence of dilution of the vote in violation of Equal Protection principles, or sheer irrationality in a state's nominating procedures, this Court has exercised its power of judicial review to nullify state limits on voter choice only if those laws, "in the context of [a State's] system[,]" *Anderson*, 460 U.S. at 803, and "taken as a whole[,]" make it "virtually impossible" for dissident votes to be counted, *Williams*, 393 U.S. at 34, and "freeze the political status quo," *Jenness*, 403 U.S. at 438.

The amici States submit that this broad standard is one that is appropriate for the federal Constitution, which must govern all the States and Territories, each with their own unique circumstances, history, and political traditions. To be sure, courts in the amici States may well interpret their state constitutions to operate more restrictively on the legislature's discretion. This, of course, is a natural development in our Federal system, where State courts, in interpreting a state constitution, properly have the last word. Petitioner relies heavily on these cases, but ultimately admits that they bespeak of state law only, and concerns which should not control a federal equity court's authority over the States, particularly in election matters. *See generally Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

In the next section, the amici will show that Petitioner fails to meet this Court's standards for evaluation of First Amendment challenges to electoral limits, or, for that matter, any standard that could be applied to write-in voting limits.

C. Both Petitioner and the District Court Have Improperly Exaggerated the Burdens Which Even Stringent Limits on Write-In Voting Place on Available Political Opportunity, and Improperly Valued the States' Important Interests.

Petitioner argues that Hawaii's ban on write-in voting renders the vote in that State "ineffective," "unacceptable," and "utterly meaningless" (Pet. Br. at 19, 21), but this could not be true under this Court's First Amendment jurisprudence.

Petitioner suggests that his only "alternative channel" is to "pass out leaflets to express his opposition to the candidates listed on the ballot" (Pet. Br. at 22), but this claim is quite erroneous. The essence of the Ninth Circuit's holding in this case was that Hawaii provides sufficient access to the *printed* election ballot, thereby meeting Mr. Burdick's claim.

While Mr. Burdick, like many litigants challenging stat election laws, labors long to prove the importance of the right to vote, that is not a point with which the amici States disagree. Rather, it is the very *reason* for the vote's importance that leads to the conclusion that it is wrong to focus on the availability merely of write-in voting on election day.

Petitioner's whole case effectively rests on his statement that "[e]lections are a dynamic part of political discourse and growth within a democratic community," and, hence, "voting involves far more than the static choice among candidates listed on the ballot." Pet. Br. at 17. The import of this truth, however, is not that write-in voting must be granted in unlimited fashion. Rather, the lesson to be drawn is that political opportunity depends

upon the availability of the legal system as a whole to those seeking to *place* candidates on the ballot.[10]

Our entire system of dual republican government rests on the proposition that there will be "gaps" in the process whereby changes in events may cause the electorate to become dissatisfied with the choices available at any particular time. The gaps at election time between filing deadlines and election day are thus reflective of larger gaps between elections themselves, during which time the electorate must rely on the system of checks and balances, together with the processes for impeachment and recall, to effect a legal transfer of power. Precisely because write-in votes, where they are allowed, must be taken seriously, Petitioner's claim in this case is nothing less than a challenge to republican forms of government generally. Whatever else it might be, the burden of republican government does not rise to the level of constitutional infirmity.

Seen in this light, Hawaii's law, like that of those other States which ban or regulate write-in votes, does not "seriously burden[ ] the expressive and participatory aspects of the constitutional right to vote" (Pet. Br. 36). For example, Hawaii's 1 per cent rule for new party petitions guarantees any group the ability to place candidates on the November ballot by formation of a new

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[10] Thus, the Constitution protects rights "of likeminded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters." *Norman v. Reed*, 112 S. Ct. at 705. There is no mandate for *unlimited* "opportunities [for] all voters," but rather for "access . . . to the ballot" consistent with the States' "weighty" interests. *Id.* In contrast, Petitioner states it is "no answer" to urge that "easy access to the ballot" is granted. Pet. Br. at 30.

"party." Under the construction of the "new party" route given by Hawaii's Lieutenant Governor, the "new party" route is an effective one as well for independent candidates who may seek to run free of the burdens of large-scale party organization. This Court has described a 1 per cent requirement similar to Hawaii's as "relatively lenient," *see Williams v. Rhodes*, 393 U.S. at 33 n.9, and, only weeks ago, upheld a signature requirement that was, numerically, almost six times as high as Hawaii's demand for roughly 4,200 signatures. *See Norman v. Reed*, 112 S. Ct. at 708 (U.S. Jan. 14, 1992).

Hawaii law takes other steps to alleviate the burdens of its "new party" route. The State, for example, provides extensive time in which to gather the signatures, and permits voters to sign one or more "new party" petitions without pledging to support the new party, or waive their rights to vote in another party's primary. *See* Haw. Rev. Stat. §§ 11-62 – 11-64. And, while Petitioner complains that the filing deadline (late April) is "extraordinarily early" (Pet. Br. at 31 n.21), Hawaii's 150-day pre-primary deadline is comparable with those this Court has approved. *See American Party of Texas v. White*, 415 U.S. at 787 n.15 (120 day pre-election deadline, combined with the possibility that the pool of signers may be "severly reduced" because Texas prohibits "any elector's casting more than one vote in the process of nominating candidates").

What is particularly disturbing about Petitioner's characterization of the "burdens" of Hawaii law is that Hawaii is not only a "petition" State, where voters can assure November ballot position by gathering sufficient signatures. Like Washington, Hawaii's primary permits independent candidates to sweep into the November

election with a miniscule showing of initial support. Under Hawaii law, nonpartisan candidates may obtain placement on the primary ballot with, at most, 25 signatures, and they are guaranteed November ballot position if they poll at the primary 10 per cent of the vote cast for the office, or the number of votes obtained by the party candidate who obtained the fewest number of votes, whichever is smaller. *See* Haw. Rev. Stat. § 12-41. This procedure, as this Court noted in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), "is more accommodating of First Amendment rights and values," because in a pure petition State "if a candidate fail[s] to satisfy the qualifying criteria, the State's voters ha[ve] no opportunity to cast a ballot for that candidate and the candidate ha[s] no ballot-connected campaign platform from which to espouse his or her views." *Id.* at 198. Hawaii thus "virtually guarantees what the parties challenging the Georgia, Texas, and California election laws so vigorously sought – candidate access to a state-wide ballot. This is a significant difference." *Id.* at 199.

Given this fact, Petitioner retreats into an argument that "[t]his is not a ballot access case," and the related view that any restriction on election-day choice renders the vote "meaningless" (Pet. Br. at 19-23), coercive (*id.* at 23-25), and impermissibly "discriminatory" (*id.* at 25-32). But these contentions are all unconvincing. But for the argument that this case does not involve the potential for unlimited ballots, this case is just as much a "ballot access" case as any others this Court has decided since *Williams v. Rhodes*. Petitioner does not simply seek the right to protest, but to cast a "vote" that, if joined by others in sufficient numbers, can transfer legal power over the institutions of Government. As this Court has

observed on many occasions, " 'the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.' " *Anderson, supra*, 460 U.S. at 786. The consequences of accepting Petitioner's absolutist view of the right to "vote" – as opposed to the right to "protest" – is that *no* State regulation of the electoral process is valid. The plain text of the Constitution, and this Court's decisions, more than answer this novel, expansive, and limitless contention.

D. The District Court's Judgment Cannot Be Reinstated on the Basis of a Public Forum Rationale.

In the final part of its opinion, the District Court suggested that the State would have to "count and publish" write-in votes, but did not give any guidance as to what that means. The court suggested that it was treating the voting booth like a "public forum," and that, at the least, the State must "count and publish" protest votes even if they do not affect the election. Petitioner's focus on the ballot box as a vehicle for conveying "his message of dissent," whether his candidate could serve (Pet. Br. 30), indicates that what is truly at issue is a subsidy at the ballot box for pure protest speech.

This analysis of voting as solely a vehicle for expression is divorced from the right to vote – and is insupportable. As the plurality observed in *United States v. Kokinda*, 110 S. Ct. 3115, 3123 (1990), a State's "generous accommodation of some types of speech testifies [only] to its willingness to provide as broad a forum as possible, consistent with its [relevant] mission." *See Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788

(1985); *cf. Rust v. Sullivan*, 111 S. Ct. 1759 (1991). As the Seventh Circuit held in a related context, "the ballot . . . is in fact not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate to vote up or down." *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982). Hawaii, and other States that do not "count" and "publish" write-in votes for candidates who cannot *legally* hold office, are not required to subsidize the protest speech of those who, however sincerely, believe the range of candidates is too narrow. The States do not violate the Constitution when they exclude speech at the ballot box for ineligible candidates, *see Cornelius*, 473 U.S. at 806, or otherwise refuse " 'to subsidize the exercise of a fundamental right' " to protest, as a general matter, that "none of the above" merit a voter's election day support. *See Rust*, 111 S. Ct. at 1772.

CONCLUSION

For the reasons above and as stated by Respondents, the judgment of the court of appeals should be affirmed.

Dated: Carson City, Nevada, March 2, 1992.

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